United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

74-2189

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN WINSTON ONO LENNON,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF DEPORTATION ORDER

BRIEF FOR PETITIONER

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FOR THE SECOND CIRCUIT

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JOHN WINSTON ONO LENNON,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF DEPORTATION ORDER

BRIEF FOR PETITIONER

Statement of Issues Presented for Review

1. Whether the Board of Immigration Appeals erred in its ruling that petitioner's guilty plea in London in November, 1968, to a charge of possessing *cannabis resin* in violation of the British Dangerous Drugs Act of 1965, which makes possession of a narcotic unlawful even if the possessor does not know the illicit nature of what he possesses, amounted to a conviction under a "law or regulation relating to the illicit possession of . . . marihuana" within the meaning of Section 212(a)(23) of the Immigration and Nationality Act.

2. Whether the Board of Immigration Appeals erred in refusing to consider the claim, based on sufficient proof to

establish a *prima facie* case, that the District Director had been motivated by constitutionally impermissible reasons in denying discretionary "nonpriority case" treatment to the petitioner.

3. Whether the Board of Immigration Appeals improperly refused to entertain the request made under 18 U.S.C. § 3504 for a government representation as to whether petitioner had been unlawfully overheard or otherwise subjected to one or more "unlawful acts."

4. Whether the deportation of petitioner on the 1968 conviction violates his rights under the First and Fifth Amendments.

5. Whether this case should be remanded to the Board of Immigration Appeals for it to consider the effect on the outstanding order of deportation of the enactment, on July 31, 1974, of the British Rehabilitation of Offenders Act, which would totally eradicate petitioner's conviction on the effective date of the Act, and whether the decision of the Board of Immigration Appeals should be reversed based upon such enactment.

Statement of the Case

This is an action to review a decision of the Board of Immigration Appeals dismissing petitioner's appeal from a decision of Immigration Judge Ira Fieldsteel, who found petitioner deportable under Section 241(a)(2) (8 U.S.C. § 1251(a)(2)) and inadmissible to the United States under Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(23), and therefore ineligible for adjustment of status under Section 245 (8 U.S.C. § 1255). The decision of the Board of Immigration Appeals,

rendered on July 10, 1974, which appears in the Appendix at 335, is reported as *Matter of Lennon,* Interim Decision No. 2304. This case has not previously been before this Court.

Statement of Facts

John Lennon is an internationally known artist who first gained renown in the field of music and has achieved world-wide acclaim in other artistic endeavors (App. 177 *et seq.*). The record in this case includes testimony and endorsements of the contribution he is likely to make to artistic life in this country from such diverse sources as the former Mayor of New York City, the Director of the Metropolitan Museum of Art of New York, television personality Dick Cavett, and the former Ambassador of Great Britain to the United States (App. *Ibid,* and 93 *et seq.*). This case concerns the effort of the Immigration and Naturalization Service to deport John Lennon from the United States on the ground that he is ineligible for permanent residence because he was convicted of simple possession of *cannabis resin* in London in November 1968.

Before turning to the particular facts upon which the Immigration Service's decision depends, we emphasize one preliminary point which is not in serious dispute: The Immigration and Nationality Act is framed in Draconian terms which are ameliorated by those who administer the law. Notwithstanding the unconditional language of the Immigration and Nationality Act, the Immigration Service has substantial discretionary authority, which it freely exercises, to permit an inadmissible alien to remain in the United States even without enjoying the formal status of a permanent resident. Humanitarian and other policy reasons vindicate the many instances in which deportation proceedings have been withheld and an ineligible alien per-

mitted to remain.[1] In response to a civil action instituted by petitioner when he was denied access to files that would establish the number of final "non-priority" decisions in which the Immigration and Naturalization Service ("INS") has administratively withheld deportation (*Lennon* v. *Richardson,* S.D.N.Y., 73 Civ. 4476), 1863 files were furnished to the petitioner. These were all represented to be "approved non-priority decisions." This indicates the sweep of administrative discretion which the Immigration Service exercises. It is against this background that the courts should appraise the validity of the INS decision

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[1] The government has furnished to petitioner's counsel a letter dated July 16, 1973, which reads, in relevant part, as follows:

> A 'non-priority' case is one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors. Generally, these cases are identified at an early stage in Service processing and are not put under deportation proceedings. However, in a number of cases the appealing humanitarian factors may occur or be recognized after proceedings have been started. In the latter cases, extended voluntary departure or stays of deportation may be granted, as appropriate.
>
> The factors which are considered in these situations include —but are not limited to—the following: (1) Significantly adverse impact on subsisting and close family relationships; (2) Age of the alien; (3) Length of residence in the United States; (4) Physical and mental health of the alien.

Several sample nonpriority cases (Forms G-312) are annexed to this brief in the form furnished by the government. They demonstrate that nonpriority status has been granted to aliens with narcotics convictions who were respectively also convicted of murder; an admitted heroin addict described as being the largest supplier of marijuana and narcotics in the area; an alien with twelve arrests and at least seven convictions including rape, contributing to the delinquency of a minor, burglary and a narcotics conviction for 6 to 10 years; an alien in whose case Congress rejected suspension of deportation; and an alien deported on four occasions and convicted of possession of marijuana and of burglary resulting in a concurrent sentence of 2 to 5 years. (See: pp. 6a *et seq.* infra.)

to move against John Lennon on the basis of a marginal 1968 conviction.

1. The Conviction

On November 28, 1968, petitioner pleaded guilty in the Marylebone Magistrates' Court to a complaint filed by a Sergeant Norman Pilcher which accused him of "having in his possession a dangerous drug to wit Cannibis Resin without being duly authorized, at 34 Montague Square, W.1. on 18-10-68." This was alleged to be a violation of "Regs. 3 Dangerous Drugs (No. 2) Regs.; Dangerous Drugs Act 1965." Petitioner was sentenced to pay a fine of 150 pounds and 20 guineas costs (App. 213).

During the hearing before the Immigration Judge petitioner denied any awareness of the drug in his house (App. 131; Tr. 81). The Board of Immigration Appeals accepted counsel's representation that the drug "was found inside Mr. Lennon's binocular case which had only recently been delivered to Mr. Lennon's home, and which had been in the possession of many others for a period of the previous six months" (see App. 347; Pet. Br. in BIA, p. 54). Petitioner's business agent also testified, on a hearsay basis, to discussions with petitioner and his British attorneys indicating that petitioner had pleaded guilty because he was afraid that his wife would be deported from England[2] and his lawyer told him "this was something that would be handled with a small fine" (App. 114). The attorney who represented petitioner in the British courts also submitted a letter (App. 174) stating that petitioner had "a good defense," but that it would have been necessary to call his wife as a witness. Since she was expecting a baby, peti-

[2] He said that petitioner's "documented" statement to the arresting detective with regard to the drug was, "If I say 'hat it's mine, will you leave her alone?" (App. 114).

tioner did not want to put her to this hardship, and he pleaded guilty. The police sergeant who conducted the raid on petitioner's home had engaged in similar practices with other popular musical performers in England and was, at the time of hearing before the Immigration Judge, under investigation for "perverting the course of justice" (App. 115; Tr. 66). Formal charges were subsequently filed against him. *The London Times,* November 15, 1973, p. 4, cols. 1-2. He was convicted of perjury and sentenced to a four-year prison term (App. 176).

2. Travel to the United States

After the November 1968 conviction, petitioner traveled to the United States many times as a nonimmigrant. On each occasion his statutory ineligibility was duly waived and he never encountered any legal difficulty in regard to these trips (App. 131-132 and 201). On August 13, 1971, petitioner and his wife, Yoko Ono Lennon, a native of Japan and an artist in her own right, entered the United States as nonimmigrants to appear in custody proceedings relating to Mrs. Lennon's child by a former marriage. They were authorized to stay until February 29, 1972, and on the following day—March 1, 1972—while the custody proceedings were still pending,[3] they received a letter from the District Director of the INS advising them that if they did not leave by March 15, 1972, deportation proceedings would be instituted. Two days thereafter—on March 3, 1972—the petitioner and his wife filed applications for third prefer-

[3] A final judgment in the custody proceedings was rendered on July 12, 1973 in favor of Mrs. Lennon, finding such custody to be in the best interests of the child, and limiting the exercise of custody to the territorial limits of the United States. The Court further found the child's father in contempt of court for failure to produce the child when ordered by the court. *Cox* v. *Lennon,* Court of Domestic Relations, Harris County, Texas, No. 876,663.

ence status under Section 203(a)(3), and these applications were approved by INS on May 2, 1972 (App. 203, 204).[4]

3. The Deportation Proceeding

In the meantime, however, the action of filing these applications—which was seen by the INS as an indication that petitioner and his wife would not leave by March 15—resulted in the institution on March 6 of the deportation proceeding now under review (App. 20). Prior to the deportation hearing, petitioner moved the District Director, who had made the decision to institute proceedings, for an order terminating them, on the ground, *inter alia,* that he qualified for non-priority classification. The District Director, referring to Appellant's conviction and mysteriously, to "other circumstances in the case", denied the motion (App. 31). No explanation of what those other circumstances were was ever given. Hearings were held before the Immigration Judge on March 16, April 18, May 12 and May 17, 1972. Thereafter legal memoranda were filed. On March 23, 1973, the Immigration Judge issued his decision.

With respect to petitioner,[5] the Immigration Judge concluded (1) that he did not have "jurisdiction" to consider

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[4] The applications had inexplicably not been ruled upon, although the INS had ample time and was required to do so. It was not until a Federal action was commenced, *Lennon* v. *Marks,* 72 Civ. 1784, and a temporary restraining order was entered in petitioner's behalf (App. 214), while the attorneys for the parties were in Court to present argument on the motion for an injunction, that the District Director advised the Court that he would rule upon the applications. The applications were approved within an hour (App. 203, 204).

[5] Petitioner's wife was a party to the proceeding and deportation was sought against her, as well. There was, however, no basis for any claim for ineligibility as to her, and it developed during the hearing that she had previously obtained permanent resident status in September, 1964, while married to her first husband (App. 202, 257). The Immigration Judge ruled that she was entitled to adjustment of status to that of permanent resident alien (App. 260, 296).

whether the District Director abused his discretion in instituting deportation proceedings (App. 254), (2) that a foreign conviction under the kind of narcotics statute described in Section 212(a)(23) renders an alien ineligible for residence under the immigration laws (App. 264, 266), (3) that the word "possession" as used in Section 212(a)(23) was not limited to possession for purpose of trafficking or sale in narcotics (App. 266, 268), (4) that the elements of "possession" required to be proved under the British Dangerous Drug Act of 1965 were that the drug is a prohibited one, that it was under the dominion and control of the defendant, and that he was aware that some substance—whether or not lawful—was in his possession (App. 269, 271), (5) that these elements, which petitioner admitted by his plea, are sufficient to bring the conviction within Section 212(a)(23) (App. 271), and (6) that, notwithstanding undisputed testimony to the contrary in the administrative record, *cannabis resin* is "marihuana" within the meaning of Section 212(a)(23) (App. 287).

4. Review in the Board of Immigration Appeals

Petitioner sought review of the Immigration Judge's decision before the Board of Immigration Appeals (App. 298). While the appeal was pending petitioner's counsel learned of the existence of an anonymous document relating to petitioner, which had, apparently, been sent from one government office to another—possibly within the Central Intelligence Agency. The document (App. 391) read as follows:

> From: Supervisor, Intelligence Division, Unit 2
>
> To: Regional Director, Group 8
>
> It has come to the further attention of this office that John Ono Lennon, formerly of the Beatles, and

> Yoko Ono Lennon, have intentions of remaining in this country and seeking permanent residence therein. As set forth in a previous communication this has been judged to be inadvisable and it was recommended that all applications are to be denied.
>
> Their relaitonship with one (6521) Jerry Rubin and one John Sinclair (4536), also their many commitments which are judged to be political and unfavorable to the present administration. This was set forth to your office in a previous report. Because of this and their controversial behavior, they are to be judged as both undesirable and dangerous aliens.
>
> Because of the delicate and explosive nature of this matter the whole affair has been handed over to the I&N Service to handle. Your office is to maintain a constant surveillance of their residence and a periodic report is to be sent to this office. All cooperation is to be given to the I&N Service and all reports are to be digested by this office.

On October 17, 1973, petitioner's counsel filed a motion before the Immigration Judge requesting "that the deportation proceedings be reopened for the purpose of conducting an evidentiary hearing" with respect to the anonymous memorandum in order to determine whether the action against the petitioner "resulted from wiretaps, surveillance or other illegal acts on the part of the government" (App. 302 *et seq.*). The Immigration Judge apparently denied the motion for lack of jurisdiction, and petitioner's counsel requested the Board of Immigration Appeals to defer oral argument in the case and to remand it to the Immigration Judge for disclosure and a hearing under 18 U.S.C. 3504 (App. 306, 307). The INS opposed any postponement or remand, and the Board of Immigration

Appeals denied the motion and directed petitioner's counsel to appear for oral argument of the appeal (App. 313).

After oral argument, during which petitioner's counsel argued principally that the merits ought not to be reached by the Board but that it should remand the case for a full hearing,[6] the Board took the appeal under advisement. On July 10, 1974, it issued its opinion dismissing the appeal (App. 334). The Board ruled (1) that it would not defer consideration of the appeal to decide whether the District Director had engaged in "selective prosecution" in proceeding against petitioner because it had no jurisdiction to review the District Director's prosecutorial discretion (App. 343, 345), (2) that it would not order a hearing under 18 U.S.C. § 3504 since the anonymous memorandum related not to evidence introduced against petitioner, but to the reason for proceeding against him (App. 340), (3) that the Dangerous Drugs Act of 1965 as authoritatively construed, imposed "a substantial knowledge requirement for conviction of possession of a dangerous drug" (App. 354), and that this requirement, as applied here, was "that the defendant have had knowledge that he possessed an illicit substance which proved to be cannabis resin" (App. 359); and (4) that cannabis resin is "marihuana" within the meaning of Section 212(a) (23) (App. 363).

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[6] Petitioner had also instituted proceedings in the United States District Court for the Southern District of New York to enjoin his deportation on the basis of illegal activity and because of discriminatory enforcement of the immigration laws. Recently—on January 2, 1975—District Judge Richard Owen denied the government's motion to dismiss the complaint on the selective enforcement claim, but granted the motion insofar as it related to alleged surveillance or other illegal activity. A copy of the judge's opinion appears at App. p. 392.

ARGUMENT

Introduction

Congress declared in Section 212(a)(23) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(23) that it did not wish to permit into the United States as permanent residents (or, in the absence of waiver, as nonimmigrants) any individual who had been

(1) convicted of

(2) a violation of any law or regulation

(3) relating to the traffic in

(4) or illicit possession of

(5) narcotic drugs or marihuana.

This case concerns the application of elements (4) and (5) to the case of John Lennon who was concededly convicted of some violation in 1968. We vigorously challenge, however, the finding of the Immigration authorities that the *law* which he admitted having violated made "illicit" possession of narcotic drugs or marihuana a crime, and we argue below that the record is entirely undisputed that cannabis resin, which Mr. Lennon pleaded guilty to having possessed, is not "marihuana."

We argue, in addition, that the Board of Immigration Appeals erred on two preliminary procedural matters which do not relate directly to the ultimate question of Mr. Lennon's qualification under the Immigration and Nationality Act. We believe that the individual facts of this case bring it within the class of cases where, by administrative practice, the District Director of the Immigration and Naturalization Service has consistently granted

administrative relief from the rigors of an inflexible statute. In this case, such relief was not granted, and there is substantial reason to believe that this result is attributable to the petitioner's political activity and views. The Board of Immigration Appeals erroneously decided that it had no jurisdiction to consider whether deportation had been instituted for unconstitutional purposes.

Similarly, the Board erred when it refused to remand the case to obtain clarification with respect to the anonymous memorandum. The Board's decision rested on a cramped and excessively literal reading of several words in 18 U.S.C. 3504 which do not bear the limiting construction given to them. Particularly in this era of belated government disclosures, it is essential for an administrative agency to make sure that before action is taken against a world-renowned figure such as John Lennon, the record is entirely clear that the government has turned square corners in all its dealings with Mr. Lennon. This may be achieved only if the authorship of the anonymous memorandum is determined and evidence is offered to establish whether it played any role in these proceedings.

One last practical word before we turn to our substantive arguments. This Court should surely not blink at the fact—demonstrated by the many letters to the Immigration and Naturalization Service in the record—that the entire international art world is watching to see whether the United States is a mature and free enough society to absorb those who offer us their skills and talents irrespective of their political associations or whether they are approved by a particular administration. Whatever might be said about the 1968 conviction of Mr. Lennon, it was, at most, a foible which cannot be viewed seriously as a basis for permanent exclusion. To drive him from the United States today because of it by an unyielding construction of

the immigration laws is to prove our own immaturity and short-sightedness. Congress, we submit, had no such intention when it enacted Section 212(a)(23) to bar only those who engaged in "illicit" possession, and the agency and the courts should not now ascribe to Congress' enactment so wooden a meaning that it will make us again—as it did in the days when Charles Chaplin and other leading artistic figures were "punished" by being driven from the United States— the laughing stock of the world.

I.

The British Law Under Which Petitioner Pleaded Guilty and Was Convicted Is Not a Law Relating to the "Illicit" Possession of Narcotics and it Does Not, on the Undisputed Evidence in the Record, Relate to Marihuana.

Section 212(a)(23) of the Immigration and Nationality Act—the cornerstone of the decision of the Board of Immigration Appeals finding petitioner deportable—is a carefully drafted provision. The portion relevant to this case does *not* bar from the United States anyone ever convicted of any offense relating to narcotics, as that word may be broadly or popularly defined.[7] Rather, ineligibility may be found only if five elements are established:

First, the alien must have been convicted. *Will* v. *Immigration & Naturalization Service,* 447 F.2d 529 (7th Cir. 1971).

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[7] The relevant language defines as ineligible

> (23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, . . .

Second, the conviction must be for a violation of a law or regulation. It would not be sufficient, in other words, to point simply to the fact that criminal punishment was administered; the immigration authorities must focus on the particular "law or regulation" which the alien violated.

Third, the "law or regulation" must be one that relates to "possession or traffic" in the substances that are statutorily defined. A law that relates to something other than "possession or traffic"—such as, for example, a law prohibiting anyone from being "under the influence of" narcotics or "using" narcotics—is not covered by this ineligibility. *Varga* v. *Rosenberg,* 237 F.Supp. 282 (S.D. Cal. 1964).

Fourth, if the defined law relates to "possession" (as contrasted with "traffic"), it must prohibit "illicit" possession. In other words, a law that forbids possession of narcotic substances but is not limited to "illicit" possession is not covered by Section 212(a)(23).

Fifth, the substances which may not be trafficked or possessed under the law must be "narcotic drugs or marihuana." LSD, for example, is clearly not covered by the statute.

Such a careful analysis of the statute is mandatory under established constitutional and judicially evolved principles. As Chief Judge Kaufman said (while a District Judge) in *Mirabal-Balon* v. *Esperdy,* 188 F.Supp. 317, 319 (S.D.N.Y. 1960): "I recognize the well-settled and salutary principle of statutory construction that, when a statute imposes penal or other harsh consequences, it is to be strictly construed. Any ambiguities are to be resolved in favor of leniency." See also *Costello* v. *Immigration and Naturaliza-*

tion Service, 376 U.S. 120, 128 (1964); *Bonetti* v. *Rogers,* 356 U.S. 691, 699 (1958); *Bridges* v. *Wixon,* 326 U.S. 135, 148 (1945). It takes no stretching of the statutory language to read it as requiring strict proof of each of the five elements described above.

As we demonstrate below, the Board of Immigration Appeals erred with regard to elements (4) and (5) relating to "illicit" possession and identity of the proscribed drug. The Dangerous Drugs Act of 1965, as authoritatively construed by the British courts, is not a statute proscribing "illicit possession" of narcotics; it imposes absolute liability once it is shown that the defendant knew that the substance which turned out to be narcotics was in his possession. (See Opinion of British counsel annexed hereto.) Nor do the terms in that statute, as applied to the case of John Lennon, cover possession of "marihuana." On the undisputed testimony at the hearing, Mr. Lennon pleaded guilty to possession of a substance that is not marihuana. Accordingly, Mr. Lennon's order of deportation and the finding that he is ineligible under Section 212(a)(23) are defective in two independent respects.

A. *The Dangerous Drugs Act Prohibited Possession Of Narcotics That Would Be Uniformly Accepted As "Licit" In The United States.*

While it is undoubtedly true that Section 212(2)(23) was designed to bar aliens who have been convicted of the described offenses in foreign courts as well as those convicted in the United States (*e.g., Gardos* v. *Immigration and Naturalization Service,* 324 F.2d 179 (2d Cir. 1963)), the ultimate interpretation of the language defining the offense is a question of United States law (e.g., *Giammario* v. *Hurney,* 311 F.2d 285 (3d Cir. 1962)). Section 212(a)(23) concerns conviction under laws relating to "illicit posses-

sion" of narcotics and marihuana, and the term "illicit" as used in this statute, requires judicial definition.

The closest analogy in the federal statutes appears to be 21 U.S.C. § 844(a), which makes it a federal offense "knowingly or intentionally to possess" narcotics. Although no reported federal decision has explicitly considered the meaning of the words "knowingly or intentionally" in this statute, several federal decisions have stated, in substance, that *"both* control and knowledge are necessary for possession." *Bass* v. *United States,* 326 F.2d 884, 888 (8th Cir. 1964), *cert. denied,* 377 U.S. 905 (1964); *Guevara* v. *United States,* 242 F.2d 745 (5th Cir. 1957). The rule in the state courts, particularly under the Uniform Narcotics Drug Act, has been clearly stated and applied. In *Ritter* v. *Commonwealth,* 210 Va. 732, 173 S.E.2d 799 (1970), the Virginia Supreme Court said (emphasis added):

> In order to convict a defendant of "possession" of a narcotic drug, within the meaning of Virginia's Uniform Narcotic Drug Act, it generally is necessary to show that defendant *was aware of the presence and character* of the particular substance and was intenitonally and consciously in possession of it. 173 S.E.2d at 805.

Faced with a similar question, the Supreme Court of Connecticut in *State* v. *Harris,* 159 Conn. 521, 271 A.2d 74 (1970), *cert. denied,* 400 U.S. 1019 (1971), quoted the New Jersey Supreme Court's rule in *State* v. *Reed,* 34 N.J. 554, 557, 170 A.2d 419, 420 (1961) (emphasis added): " 'Possess' as used in criminal statutes, ordinarily signifies an intentional control of a designated thing *accompanied by a knowledge of its character."* See also *State* v. *Faircloth,* 181 Neb. 333, 148 N.W.2d 187, 190 (1967) (. . . the evidence must show that the accused had physical or constructive

possession with knowledge of the presence of the drug *and of its character as a narcotic.*"); see generally Annot. 91 A.L.R.2d 810, 821-827 (1963), and authorities cited.

These generally accepted principles give meaning to the term "illicit" in Section 212(a)(23). They require that the courts apply the immigration law to cover only such laws as would satisfy the minimum standards of culpability in American courts. And this means that a foreign law relating to possession of marihuana is included within Section 212(a)(23) *only* if it prescribes, as elements of the offense of possession, knowledge of (1) presence of the drug and (2) its character as a narcotic. The British Dangerous Drugs Act of 1965 fails on the second of these counts, and a conviction under it (particularly if, on its own facts, this element of knowledge was missing) does not make an alien ineligible for immigrant status.

The British law may be derived from the cases discussed in the opinion of the Board of Immigration Appeals (App. 349-361). The case most directly in point is *Lockyer* v. *Gibb*, [1966] 2 All E.R. 653 (Q.B.), which concerned a defendant who had been arrested in possession of a small brown bottle containing tablets. She claimed she did not know what the tablets were, but they were found to be morphine sulphate, a substance covered by the Dangerous Drugs Act. The magistrate who found her guilty said that it made no difference "that she did not know the contents of the bottle." On appeal, the Queen's Bench affirmed the conviction, the Chief Judge noting that he "cannot, though it is not conclusive, omit from consideration the fact that the word 'knowingly' does not appear before 'possession'." [1966] 2 All E.R. at 656. Accordingly, the court concluded that under the Dangerous Drugs Act "while it is necessary to show that the appellant knew that she had the articles which turned out to be a drug, it is not necessary that she

should know that in fact it was a drug and a drug of a particular character." *Ibid.*[8]

Lockyer v. *Gibb* was discussed in the leading decision of the House of Lords on this question. In *Warner* v. *Metropolitan Police Comm'r,* [1968] 2 All E.R. 356 (H.L.), the five Law Lords issued discursive opinions on the subject of the state of mind needed for conviction under the possession provision of the Dangerous Drugs Act of 1965. Lords Morris and Guest squarely agreed with the view of Chief Judge Parker in *Lockyer* v. *Gibb* that it made no difference whether or not the defendant knew the nature of the substance he possessed.[9] Lord Wilberforce said as follows (*Id.* at 393):

> On this same basis, the actual decision of the Court of Criminal Appeal in *Lockyer* v. *Gibb* was, I think, correct, for there the accused had, and knew that she had, control of the tablets, but possibly did not know what they were. She was held to be in possession of them. One can only hold this decision to be wrong if the view is taken that to constitute possession under

[8] The court's holding in this regard was emphasized by its explicit disagreement with the Canadian decision in *Beaver* v. *R.,* [1957] S.C.R. 531, where the court reversed a conviction of a defendant "who had physical possession of a package which he believed to contain a harmless substance and which in fact contained a narcotic drug. . . ."

[9] Lord Morris' view was summed up at the end of his opinion when he observed that the prosecution need only prove "(a) that the accused was knowingly in control of some article or thing or substance or package or container in circumstances which had enabled him to know or to discover (or could have enabled him, had he so wished, to know or to discover) what it was that he had before assuming control of it or continuing to be in control of it, and (b) that, whether the accused knew this or not, the article or thing or substance or package or container that he had, consisted of, or contained, a prohibited substance." [1968] 2 All E.R. [H.L.] at 381. Lord Guest quoted the language of Chief Judge Parker quoted above and explicitly approved it. *Id.* at 384.

> this legislation knowledge not merely of the presence of the thing is required, but also knowledge of its attributes or qualities. Nevertheless (except perhaps under the olde law of larceny) no definition or theory of possession requires so much, nor does the language or scheme of the Act postulate that such a degree of knowledge should exist.

Lord Pearce also affirmed the rule of *Lockyer* v. *Gibb*. He said that "the term 'possession' is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse." Focusing very specifically on the question of knowledge of the *character* of the substance Lord Pearce said, "Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so I think even if I believed them to be sweets." *Id.* at 388.

Of the five Law Lords, only Lord Reid raised some doubt as to the validity of the principle expressed by Chief Judge Parker in *Lockyer* v. *Gibb*. *Id.* at 369. Since no one else concurred with that view, it is clear that the Lords, by a vote of 4-to-1, read the Dangerous Drugs Act as *not* requiring the element which is uniformly part of American law on unlawful possession—knowledge of the *character* of the substance being possessed.

The Board of Immigration Appeals confused the legal issue and misunderstood the British opinions because it merged, for purpose of its analysis, the separate questions of (1) knowledge that a substance is in the defendant's possession and (2) knowledge of the character of that substance. Many of the cases discussed in the Board's opinion such as *R.* v. *Smith*, [1966] Crim. L. Rev. 558; *R.* v. *Marriott*, [1971] 1 All E.R. 595 (C.A.); *R.* v. *Irving*, [1970] Crim.

L. Rev. 642; and *Sweet* v. *Parsley*, [1969] 1 All E.R. 347 (H.L.), dealt with the issue of whether the defendant knew the substance was under his control. They did not discuss the rule applicable if knowledge of its existence, but not knowledge of its character, is proved or acknowledged.

By confusing these separate questions, the Board also misunderstood the opinions in *Warner*. To be sure, *all* the Law Lords agreed that there was a "substantial knowledge requirement" for conviction under the Dangerous Drugs Act—but the question is "knowledge of what?" Four of the Lords, as we have noted above, would not require knowledge of the character of the substance possessed.

Since, under generally accepted American law, possession is *not "illicit"* if the possessor does not know the unlawful quality of what he is possessing, the British Dangerous Drugs Act is simply *not* a law relating to "illicit possession" of narcotics within the meaning of Section 212(a)(23). This is particularly true in a case such as this one, where the information available to the INS indicates that Mr. Lennon did not know what he is alleged to have possessed. The Board of Immigration Appeals accepted the representation by counsel that the basis for the charge was that a binoculars case containing cannabis resin had been found in his apartment, and it appears from other evidence in the record that the binoculars case had passed through many hands in the period immediately before it reached petitioner's apartment. Hence petitioner neither knew that the unlawful substance was in his possession nor had any information that could have led him to inquire or learn its character. On this record, therefore, it would be most unjust to exclude him from the United States because he pleaded guilty to a narcotics offense in a jurisdiction where his ignorance gave him no defense. This conclusion is con-

firmed by eminent British counsel whose opinion is annexed to this brief.

B. *The Immigration Service Record Established That Cannabis Resin Is Not Marihuana.*

At his Immigration Service hearing, petitioner presented the testimony of Dr. Lester Grinspoon, an Associate Professor of Psychiatry at the Harvard Medical School and the Director of Science and Research at the Massachusetts Mental Health Center. Dr. Grinspoon, who had published about sixty papers dealing with drugs (App. 206-212) and the author of a book titled *Marijuana Reconsidered* (App. 205), provided expert testimony regarding the relationship between cannabis resin (which petitioner admitted having possessed) and marijuana (which is the substance to which Section 212(a)(23) relates). The critical portion of his testimony was as follows (App. 86):

Q. Is Cannabis Resin Marijuana?

A. Cannabis Resin is not marijuana.

Q. Is Cannabis Resin a narcotic drug?

A. Cannabis Resin is not a narcotic drug.

Dr. Grinspoon went on to define marijuana as "the cut part of the cannabis sativa plant . . . a cutting of the parts usually mixed with stems and seeds and so forth and so on" (App. *Ibid.*). Dr. Grinspoon further testified that "there is no question that marijuana refers to just this particular form of the plant and not to the resin" (App. 87).

Thereafter the witness concluded his testimony as follows (App. *Ibid.*):

Q. Based upon your knowledge and experience, and research in this field, would I be correct in saying

that it is your opinion that Cannabis Resin is not marijuana?

A. Cannabis Resin is not Marijuana. Marijuana is not Cannabis Resin.

On cross-examination, Dr. Grinspoon testified that cannabis resin was the "source" of hashish, but that it had to be treated by being dried and heated before it could be used as hashish (App. 89). Thereafter, asserting he had not had advance notice of Dr. Grinspoon's testimony, the attorney for the Immigration Service terminated his examination and reserved the right to recall the witness (App. 91-92). The witness was never recalled, and the Immigration Service offered no testimony whatever on this issue.

Dr. Grinspoon's qualifications as an expert were accepted by the INS (App. 84); his testimony was both unequivocal and uncontradicted. Yet, using his own judgment and substituting it for the expert's, the Immigration Judge read Section 212(a)(23) as encompassing cannabis resin in the term "marijuana." This was a crucial finding, since the 1968 conviction could result in Mr. Lennon's exclusion only if it was a conviction relating to illicit possession of marijuana, and the official British record referred only to possession of cannabis resin (App. 213). The Immigration Judge's decision appears to have been based on his assumption that Congress would have wanted to exclude anyone who was found to have possessed "the concentrated natural products of the marijuana plant" (App. 285). The Board of Immigration Appeals reasoned somewhat differently. It said that court decisions which established that hashish is "a refined form of marijuana" apply here and require rejection of petitioner's contention (App. 362 *et seq.*).

The Board of Immigration Appeals overlooked the fact that in the two cases it cited—*United States* v. *Piercefield,* 437 F.2d 1188 (5th Cir. 1971), *cert. denied,* 403 U.S. 933 (1971), and *United States* v. *Cepelis,* 426 F.2d 134 (9th Cir. 1970), *cert. denied,* 404 U.S. 846 (1971)—there was, respectively, testimony and a stipulation that the form of hashish involved in those cases was equivalent to marijuana. 437 F.2d at 1190, n.1; 426 F.2d at 136. If the court could simply have taken judicial notice of this interrelationship, there would have been no need for the testimony or the stipulation. The fact remains that the relation between cannabis resin and marijuana is a subject of dispute among experts. If the Immigration Judge had before him proof introduced by the Service contradicting Dr. Grinspoon, he might have weighed the evidence and rejected Dr. Grinspoon's testimony. But he had no proof whatever conflicting with what Dr. Grinspoon had said or challenging his acknowledged qualifications as an outstanding expert in the field. In this context, the applicable rule is the one stated by the Ninth Circuit in *Franklin Supply Co.* v. *Tolman,* 454 F.2d 1059, 1071 (9th Cir. 1972):

> [W]here the answer is one requiring evidence from a professional and that evidence is received, not contradicted and no reason appears to doubt the credibility of the witness or the accuracy or inherent probability of the opinion, the fact should be deemed established.

To be sure, expert testimony may be appraised by a fact-finder along with all other proof, and the credibility of the witness is an important factor in such an evaluation. But, as this Court noted in *Alvary* v. *United States,* 302 F.2d 790, 794 (2d Cir. 1962), "A trial judge cannot arbitrarily disregard all the expert testimony in the record and rely upon his unsubstantiated personal beliefs instead of upon

evidence." Courts have overturned administrative conclusions particularly when an administrative agency goes outside its record to take official notice of some fact that the parties dispute. See, *e.g., Glendenning* v. *Ribicoff*, 213 F. Supp. 301 (W.D.Mo. 1962); *United States ex rel. Ott* v. *Shaughnessy*, 116 F. Supp. 745 (S.D.N.Y. 1953).

This rule applies all the more with respect to Immigration Service proceedings, where Congress' policy is most clearly stated. Describing the functions of the Immigration Judge (called a "special inquiry officer" by the statute), Section 236(a) of the Immigration and Nationality Act, 8 U.S.C. § 1226(a), states expressly:

> The determination of such special inquiry officer shall be based only on the evidence produced at the inquiry.

The short of the matter is that there is no evidence whatever in the record regarding the character of cannabis resin other than Dr. Grinspoon's clear and unqualified testimony that it is *not* marijuana. On this one-sided record, it hardly seems credible that a leading artistic figure is to be kept out of the United States because an Immigration Judge—on the basis of his own unsubstantiated guess—and the Board of Immigration Appeals—applying their own inexpert judgment—determine to disagree with the expert.

Two final points should be made in this regard. First, it is essential to recall that in deportation cases the evidentiary standard that must be met to sustain deportability is "clear, unequivocal and convincing evidence." *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285-86 (1966). The "clear, unequivocal and convincing evidence" in this record not only does not support petitioner's deportation; it affirmatively demonstrates that the basis

for deportation—that he was convicted of an offense involving marijuana possession—is wrong.

Second, the factual nature of the inquiry whether cannabis resin or hashish (its derivative) is the same as marijuana has been resolved by the INS, in another case on another record, in precisely the opposite way. In *Matter of Gray,* File No. A30-310-271, decided on September 23, 1971 (which is in the record of this case and appears at App. 244 *et seq.*), the Immigration Judge ruled as follows:

> The statute under which it is alleged that the applicant is excludable refers to "narcotic drugs" and to "Marijuana." The applicant was convicted of possession of hashish. There is no allegation here that hashish is a narcotic drug. It is urged that hashish should be included in the term "marijuana" because both are derivatives of Cannabis Sativa. However, neither "hashish" nor "Cannabis Sativa" are mentioned in the statute.
>
> On consideration of this entire record, and in the absence of any law, regulation or decision of the Board or of any Court finding that the words "hashish" and "marihuana" are the same or interchangeable, it will be concluded that the applicant has not been convicted in violation of law relating to possession of a "narcotic drug" or "marijuana."

The Immigration Service thereafter withdrew an appeal it had filed in the case (App. 243).[10] If the result reached

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[10] The *Gray* decision and the copy of the INS General Counsel's withdrawal of the BIA appeal in the case were obtained through a request under the Freedom of Information Act, (App. 242) as the INS does not publish all its decisions, nor are all decisions available in reading rooms as required by the Freedom of Information Act. The Service publishes in volumes noted as "Interim Decisions" only those decisions it chooses to cite as precedents.

by the Immigration Judge in *Gray*—where there was no expert testimony supporting the applicant—is permissible (and was accepted by INS), it follows, *a fortiori*, that the Immigration Judge and the Board of Immigration Appeals should have reached the same result in the case of Mr. Lennon.

II.

The Board of Immigration Appeals Erred in Ruling That It Did Not Have Jurisdiction to Question the Basis for the District Director's Extraordinary Departure From Usual "Non-Priority" Standards in This Case.

Despite the unconditional language of the Immigration and Nationality Act, the Immigration Service has engaged in the administrative practice of withholding deportation of individuals who might be technically deportable but whose personal circumstances involve humanitarian or other considerations justifying their continued stay in the United States. See note 1, *supra*, for a description of the INS criteria.

The present case came within the usual INS standards for at least two reasons:

First, the petitioner's wife had a child by an earlier marriage who was being held incommunicado by the child's father in violation of state and federal court orders. At the time the deportation proceeding was begun, the INS knew that Mr. Lennon and his wife were looking for the child, who is an American citizen. Disregarding the Lennons' plea for additional time to continue their efforts to find the child and carry out judicial custody orders and contrary to the Immigration Service's invariable practice of deferring deportation when it would have the effect of separating immediate families, the District Director in-

stituted the present proceeding and sought to deport the Lennons.

Second, the petitioner and his wife qualified for third-preference status because of their exceptional professional qualifications (App. 203, 204). When, in addition to personal humanitarian concerns, it is in the public interest to defer deportation—such as with individuals possessing unusual skills—the Immigration Service has recognized the desirablility of such deferral.

The extraordinary character of the proceeding against petitioner is further demonstrated by the unusual speed with which the Immigration Service moved against the Lennons. Although it ordinarily takes some time for the Service to institute proceedings against a visiting alien who has merely overstayed the period of time he was authorized to remain in the United States, the District Director sent a letter to the Lennons on March 1, 1972, advising them that their temporary stay had expired *on the previous day* and giving them 15 days to get out of the country (App. 18). Even that 15-day period was precipitously cut short on March 6, 1972, when it was learned that the Lennons had filed applications for third preference classification as outstanding artists (App. 19). This second abrupt and discourteous letter told the Lennons that "the privilege of voluntary departure" was immediately revoked and deportation proceedings were being instituted. The ground for deportation, as stated in the order to show cause filed on March 6, 1972, was not that Mr. Lennon presented some threat of immediate harm to the United States. The sole allegation—as of March 6—was that he had stayed beyond February 29 (App. 20). There has probably never been an "overstay" case in the history of the Immigration and Naturalization Service where deportation proceedings, solely on account of the overstay, were brought within a

week of the date by which the alien had been authorized to leave and it is most extraordinary for the INS to create the overstay status by revoking a period of time to leave the country.

These factors—even apart from the anonymous memorandum discussed below—made a *prima facie* case of "selective" and "discriminatory" prosecution and refusal to accord "non-priority case" status to the Lennons. The only conceivable reason that the District Director could have selected the petitioner for this kind of special treatment is the fact that he was well-known for his political views and associations in the United States. We discuss at pp. 32-35, *infra*, the reasons why selection of petitioner for special treatment on this ground violates liberties protected by the First Amendment, and we submit that the vindication of these liberties requires exploration of the District Director's decision in the Immigration Service proceeding.

The Board of Immigration Appeals erroneously concluded that it lacked jurisdiction to consider this claim (App. 339). The authority of the Board of Immigration Appeals is the delegated power conferred on the Attorney General by Section 236(b) of the Immigration and Nationality Act, 8 U.S.C. § 1226(b). Pursuant to 8 C.F.R. § 3.1, the Board was established within the Department of Justice to review, *inter alia*, decisions in deportation cases. See 8 C.F.R. § 3.1(b)(2). Pursuant to Section 3.1(d)(1), the Board "shall exercise such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case." If, as is true here, it is "appropriate and necessary" to a proper consideration of the order of deportation to examine whether it was initially filed for unconstitutional and

improper reasons, the Board has, we submit, ample statutory and regulatory authority to consider that question.

The District Director of the INS is not, as the Board might have it appear, an independent agent whose reasons and actions may not be examined by the Board. In fact, he too is delegated the powers given to the Attorney General by the Act, both directly and via the delegation of the Attorney General's powers to the Commission of the Immigration and Naturalization Service. See 8 C.F.R. §§ 2.1, 100.2, 103.1(f). Ultimately, the Attorney General may—indeed, he must—review all actions taken in his name by the Immigration and Naturalization Service. To the extent he has delegated that function, in deportation cases, to the Board of Immigration Appeals, that Board has the duty of examining the fairness of any action taken by a District Director.

This is therefore not a case of "prosecutorial discretion," like the situation that exists when a prosecutor—who represents the Executive—files an action before an Article III court. The court's powers are then limited—although there has recently been increased recognition of the possibility of investigation into abuses of prosecutorial discretion. See this Court's decision in *United States* v. *Berrios,* 501 F.2d 1207 (2d Cir. 1974). On this record, the Board of Immigration Appeals should have authorized a full-scale inquiry into the justification, if any, for the specially harsh treatment accorded Mr. Lennon.

III.

The Board of Immigration Appeals Should Have Remanded for a Hearing Under 18 U.S.C. 3504 on the Anonymous Memorandum.

While the appeal from the decision of the Immigration Judge was pending, petitioner's counsel obtained the anonymous memorandum that indicated that Mr. Lennon was the target of "intelligence activity" in the United States and that he was viewed suspiciously as an "undesirable and dangerous alien." This memorandum raised the likelihood that he had been subjected to "unlawful acts" within the meaning of 18 U.S.C. § 3504.

As acknowledged by the Board of Immigration Appeals, section 3504 covers proceedings before the Immigration Service, which is surely an "agency, regulatory body, or other authority of the United States." Nonetheless, the Board of Immigration Appeals held that a remand to obtain a specific response regarding this memorandum was unnecessary because no claim was made that "*evidence* relating to deportability or ineligibility for adjustment of status may have been illegally obtained" (App. 341).

This is a narrow and unjustified construction of Section 3504. In *Gelbard* v. *United States,* 408 U.S. 41 (1972), the Supreme Court rejected a similar contention when it was made by the government in response to a grand jury witness' invocation of the procedural rights conferred by that statute. The Court said that since Section 3504 protected grand jury witnesses and there is no likelihood that in a grand jury proceeding there would be evidence from others admitted against a witness, a " 'claim . . . that evidence is inadmissible' can only be a claim that the witness' potential testimony is inadmissible." 408 U.S. at 54. Similarly, in

an Immigration Service proceeding, the questions asked at the hearing—where both petitioner and his wife testified —and the notices sent to cut short petitioner's temporary stay (App. 18, 19), which were submitted in evidence, may well have been infected by an "unlawful act" committed by government agents. The petitioner was asked, under oath, whether he intended to stay in the United States, and questions were put to him regarding his payment of federal taxes and his business relationships in the United States (App. 134 *et seq.*) Petitioner was entitled to a hearing to determine whether any or all of the information upon which these questions were based could be attributed to illegal electronic surveillance or other unlawful conduct. It was the government's burden to establish—after checking with CIA sources—that there was no illegal surveillance. And if there was, in fact, some illegal surveillance, it was then the government's job to prove that there was "an indedent basis, aside from the illegal surveillance, upon which to justify the questions propounded. . . ." *In re Egan,* 450 F.2d 199, 216 (3d Cir. 1971), *aff'd sub nom. Gelbard* v. *United States,* 408 U.S. 41 (1972).

The allegation may not simply be shrugged off. The anonymous memorandum is substantial evidence that some skulduggery was afoot in government agencies, and recent public disclosure of extensive covert activity by the CIA within the United States corroborates the natural inference growing out of the memorandum that Mr. Lennon was the target of particular government scrutiny. It is, therefore, the government's burden to establish by substantial proof that no such activity existed, and the Immigration Service proceeding is a proper one in which to make that inquiry. See *United States* v. *Alter,* 482 F.2d 1016 (9th Cir. 1973); *United States* v. *Toscanino,* 500 F.2d 267, 281 (2d Cir. 1974) ("district court was obligated to direct the prosecutor

to put his oral denial of the allegation in affidavit form, indicating which federal agencies had been checked. . . .").

IV.

Deporting Petitioner on Account of His Political Views and Associations Violates His First and Fifth Amendment Rights.

The anonymous memorandum discussed above bears on this case not only because of the likelihood that there were illegal acts which resulted in questions being directed at the petitioner or other evidence, but also because it indicates that the deportation of Mr. Lennon would constitute a means of suppressing liberties protected by the First Amendment.

We began by noting that Mr. Lennon is widely respected by millions of Americans for the art he creates and disseminates. The sample materials from the "National Committee for John and Yoko" which appears in the Appendix (App. 177 *et seq.*) are but a small part of the total public sentiment of people who wish to hear from and have access to Mr. Lennon in the United States. This right—in the form of a liberty "to hear, speak and debate" with an internationally recognized figure—was recognized as a legitimate interest protected by the First Amendment in *Kleindienst* v. *Mandel,* 408 U.S. 753 (1972), even though the Supreme Court concluded that a "facially legitimate" reason for exclusion overrode such a claim.

In the present case, there is a substantial reason to doubt the legitimacy of any "facial" reason for seeking to hasten Mr. Lennon out of the country, and his rights, as well as those of prospective listeners, are at issue. The petitioner is now in the United States and, as one who

is physically present in the country, he has rights of free speech and association equivalent to those of citizens or permanent residents. If the District Director has selected him for deportation because, in the language of the memorandum, of his "relationship" with notorious individuals or because of his "many commitments which are judged to be political and unfavorable to the present administration," the selection amounts to an unconstitutional act. Associational rights of this kind are protected even against indirect restriction. See *Williams* v. *Rhodes,* 393 U.S. 23 (1968); *NAACP* v. *Alabama,* 357 U.S. 449 (1958). Petitioner's status as an alien admitted temporarily may not diminish his right not to be discriminated against and selected out solely, or even partially, because of his political views. Compare *Speiser* v. *Randall,* 357 U.S. 513, 518-520 (1958); *Milwaukee Pub. Co.* v. *Burleson,* 255 U.S. 407, 430-431, 437 (1921) (Brandeis, J., dissenting, and Holmes, J., dissenting). In the *Milwaukee Publishing* case, Justice Brandeis said: "Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and that it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression." 255 U.S. at 431.

In addition, other constitutional liberties would be infringed by the deportation of Mr. Lennon. Even though government agencies have sweeping powers when they deal with aliens and consider their deportability, there *are* limits imposed by the Due Process Clause of the Fifth Amendment. *Galvan* v. *Press,* 347 U.S. 522 (1954). The

Supreme Court recognized again in *Galvan* that the deportation decision may "deprive a man 'of all that makes life worth living'" (quoting from *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1972)) and that it "is a drastic measure . . . at times the equivalent of banishment or exile" (quoting from *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)). Accordingly, the deportation decision may not be imposed in a wholly arbitrary or irrational manner.

Arbitrariness and irrationality is, however, the hallmark of the present effort at deportation. We have indicated above (as the Board of Immigration Appeals appeared to accept), that Mr. Lennon was convicted in London without any knowledge on his part that the allegedly dangerous drug was in the seized binoculars case or that the substance was, in any manner, illicit. Accordingly, the "drastic remedy" is being imposed for wholly guiltless conduct. In *Fong Haw Tan* v. *Phelan supra*, the Court recognized that the "forfeiture . . . of a residence in this country . . . is a penalty," and like all penalties, it may not be irrationally imposed. And in *Rowoldt* v. *Perfetto*, 355 U.S. 115 (1957), the Supreme Court, against the background of constitutional rights, reversed an order of deportation based on "insubstantial" evidence of affiliation with the Communist Party. See also *Woodby* v. *Immigration & Naturalization Service, supra.*

Imposing the drastic punishment of deportation on Mr. Lennon for wholly innocent conduct abroad is, therefore, a violation of the Due Process Clause of the Fifth Amendment and a form of cruel and unusual punishment under the Eighth Amendment. Compare *Robinson* v. *California*, 370 U.S. 660 (1972); *Trop* v. *Dulles*, 356 U.S. 86 (1958); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). Cf. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. Pa. L. Rev. 758 (1963).

The irrationality of deportation as a punishment for such past conduct is heightened by the fact that the conduct occurred outside the United States a number of years ago. This is not, in other words, a case like *Buchowiecki-Kortkiewicz* v. *Immigration & Naturalization Service,* 455 F.2d 972 (9th Cir. 1972), where the constitutional challenge is to deportation based on a conviction for possessing marijuana *in the United States.* There is, to be sure, some rational basis for saying to aliens who come to the United States that their future eligibility for permanent residence depends on total compliance with all laws relating to drugs, and that even so slight a violation as a plea of guilty to personal possession of marijuana renders one liable to deportation—so long as Congress "has made the classification." 455 F.2d at 972. But this case involves *past* conduct, in a *foreign* country, and a record establishing a total absence of *mens rea.* In these circumstances, deportation of a highly respected figure, with substantial personal business associations in the United States, simply oversteps the line of arbitrariness drawn by the Fifth Amendment.

In *Johnson* v. *Robison,* 415 U.S. 361, 374 (1974), the Supreme Court restated the well-established rule that a classification fixed by federal legislation "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . ." The "object" of the Immigration and Nationality Act is to select from among those who wish to become residents and citizens of the United States and exclude those who are undesirable from the vantage point of the national interest. But an interpretation of the law that results in exclusion of Mr. Lennon, on the accepted facts of his case, or of any other alien who obtained a similar conviction abroad, can have no "fair and substantial relation" to Congress' legitimate ends.

V.

The Case Must, at the Very Least, be Remanded for Consideration by the Immigration and Naturalization Service of the Effect of the Recently Adopted Rehabilitation of Offenders Act, Which Will Totally Eradicate Petitioner's Conviction.

On July 31, 1974, the English Parliament enacted the "Rehabilitation of Offenders Act" (App. 402 *et seq.*) which provides that convictions enumerated in the law are to be totally eradicated if, during a specified period after conviction, the convicted person is convicted of no further offense. The critical operative section of the law, Section 4(1), provides as follows:

> Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offense or offenses which were the subject of that conviction; and, notwithstanding the provisions of any other enactment or rule of law to the contrary, but subject as aforesaid—
>
> (a) no evidence shall be admissible in any proceedings before a judicial authority exercising its jurisdiction or functions in Great Britain to prove that any such person has committed or been charged with or prosecuted for or convicted of or sentenced for any offense which was the subject of a spent conviction; and
>
> (b) a person shall not, in any such proceedings be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a

spent conviction or spent convictions or any circumstances ancillary thereto.

Plainly, the intent and purpose of this law is to wipe away totally all criminal records for those guilty of minor infractions who demonstrate by their performance that they are rehabilitated. Under the provisions of the law, Mr. Lennon's conviction would be eradicated the instant the law takes effect—July 1, 1975.

We have argued above all our reasons for believing that the order of the INS is invalid and should be reversed outright. If, however, this court is not satisfied by these arguments, we believe that the changed circumstances *under English law* between the date of the decision of the Board of Immigration Appeals and consideration of the cases by this court warrants no less than a remand for consideration by the Board of the effect of the Rehabilitation of Offenders Act.

In reliance on the advice of the Solicitor General in *Andrade-Gamiz* v. *Immigration and Naturalization Service,* 9th Cir. No. 73-2174, reversed and vacated as moot, 416 U.S. 965 (1974), the Immigration and Naturalization Service has recently accepted the position that a youth offender whose marijuana conviction is "expunged" under State law is relieved from deportation. This was the rule applied by the Court of Appeals for the First Circuit in *Mestre Morera* v. *Immigration & Naturalization Service,* 462 F.2d 1030 (1st Cir. 1972).

The First Circuit's action in *Morera* was consistent with the usual rule under the immigration law that convictions may not be the basis for deportation if they are expunged or set aside pursuant to federal or state laws providing such a remedy—such as, for example, laws relating to the

completion of a period of probation or youth-offender treatment. *E.g., Garcia-Gonzales* v. *Immigration & Naturalization Service,* 344 F.2d 804, 810 (9th Cir. 1965), *cert. denied,* 382 U.S. 840 (1965). This policy has been followed by the INS. *E.g. Matter of G——,* 1 I & N Dec. 96; *Matter of O—— T——,* 4 I & N Dec. 265; *Matter of G——,* 9 I & N Dec. 159, 165; *Matter of Gutnick,* 13 I & N Dec. 672.

In advising the INS that it should follow the same policy with regard to State expungements of marijuana convictions, the Solicitor General stated (footnote omitted):[11]

> The crucial legislative development relied upon by the Attorney General in Matter of A– F–, as indicating a strong congressional policy favoring deportation of aliens involved in narcotics traffic, was the Narcotics Control Act of 1956, 70 Stat. 575. That act added language to Section 1251(a)(11) from its provision that a pardon or recommendation of the sentencing judge against deportation would bar deportation under Section 1251(a)(4), based on conviction of a crime of moral turpitude. Prior to 1960, however, Section 1251(a)(11) applied in terms only to convictions involving narcotics and did not apply to marihuana offenses. Therefore, the 1956 amendment does not necessarily reflect a clear national policy as to marihuana offenses.

The same policies that warranted recognition of the expungement in *Andrade* warrant full recognition of the effect of new English law on Mr. Lennon's marijuana conviction. At the very least, therefore, this case should be remanded so that the Board may fully consider the effect of the law on petitioner's present status.

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[11] The Solicitor General's letter is reproduced as an Appendix to the Board of Immigration Appeals Interim Decision #2276 in *Matter of Andrade,* No. A-11351779, issued April 5, 1974.

CONCLUSION

For the foregoing reasons, the decision of the Board of Immigration Appeals should be vacated and reversed.

Respectfully submitted,

LEON WILDES
Attorney for Petitioner
515 Madison Avenue
New York, New York 10022
(212) 753-3468

Of Counsel:

NATHAN LEWIN

APPENDIX

APPENDIX

Affidavit of John Cyril Smith

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

In the Matter of

JOHN WINSTON ONO LENNON,

Appellant.

JOHN CYRIL SMITH, being duly sworn deposes and says:

1. I am a barrister-at-law in the country of England, being called to Bar in 1950 (Lincoln's Inn) I attended Downing College in The University of Cambridge where I gained my Bachelor of Arts degree in law with first class honours. I remained at Cambridge for a further year and attained the degree of Bachelor of Laws. I also hold a Master of Arts degree, and became a Fellow of The British Academy in 1973. Between 1952 and 1953 I was a Commonwealth Fund Fellow at The Harvard Law School in The United States of America. I have held various posts in The University of Nottingham, England, as a lecturer in law, and in 1958 I was appointed Professor of Law. Until recently I was Head of The Department of Law at The University, a post I have now surrendered as I have been elected Pro-Vice Chancellor of the whole University.

I have specialised in the field of criminal law being the joint author (with Brian Hogan) of "Criminal Law", a leading textbook first published in 1965. I have also written a book entitled "The Law of Theft" which was published first in 1968. Apart from articles in various legal period-

icals I am also joint compiler of "A Casebook on Contract" with Professor J. A. C. Thomas of University College, London.

2. I am submitting this Affidavit at the request of counsel for John Winston Ono Lennon, who has consulted me to obtain my views regarding the meaning of the Dangerous Drugs Act of 1965 as it might apply to the situation of Mr. Lennon under Section 212(a)(23) of the United States Immigration and Nationality Act.

3. At the request of Leon Wildes, Esq., counsel for Mr. Lennon, I have read the opinion of the Board of Immigration Appeals in Trial A-17-595-321, *rendered* on July 10, 1974. My attention has been directed particularly to page 25 of that opinion, in which the Board of Immigration Appeals states the following conclusion regarding British law as relevant to its decision:

> Conviction for possession of cannabis resin under the Dangerous Drugs Act of 1965 required that the defendant had had knowledge that he possessed an illicit substance which proved to be cannabis resin. A person who was entirely unaware that he possessed any illicit substance would not have been convicted under the Dangerous Drugs Act of 1965.
>
> In my opinion this conclusion is erroneous.

4. Under the leading decision of the House of Lords, *Warner* v. *Metropolitan Police Commissioner,* (1968) 2 All E.R. 356 (H.L.) the law in England under the Dangerous Drugs Act of 1965 was that an accused was guilty if it was established that he knew he had a thing which turned out to be an illicit substance, whatever might have been his

state of knowledge as to the nature of that thing. It was *not* an essential element of the prosecution's proof to establish that the accused "had knowledge that he possessed an illicit substance". An accused could be convicted even if he "was entirely unaware that he possessed any illicit substance," so long as the evidence showed that he was aware that he possessed a substance and that substance turned out to be a dangerous drug. The Critical language in the *Warner* decision is that which appeared in the speech of Lord Pearce (whose view was joined by Lords Reid and Wilberforce). When he said

> I think that the term "possession" is satisfied by a knowledge only of the existence of the thing itself and not its qualities, and that ignorance or mistake as to its qualities is not an excuse. This would comply with the general understanding of the word "possess". Though I reasonably believe the tablets which I possess to be aspirin, yet if they turn out to be heroin I am in possession of heroin tablets. This would be so, I think, even if I believed them to be sweets.

5. Accordingly, it is my view that if the Board of Immigration Appeals relied, for its conclusion in the case of Mr. Lennon, on the assumption that the Dangerous Drugs Act of 1965 requires proof of knowledge of possession of an illicit substance, the Board erred.

6. I have been asked, in this regard, whether Mr. Lennon would have been guilty of a violation of the Dangerous Drugs Act of 1965 if, at the time cannabis resin was found in his apartment, he knew that there was some substance there but did not know that it was cannabis resin. In my view, under the *Warner* decision and other later prece-

dents, he would have been guilty under the Dangerous Drugs Act of 1965.

7. I have also been asked whether marijuana is the same as cannabis resin. The Dangerous Drugs Act of 1965 specifically defines cannabis resin as "the separated resin, whether crude or purified, obtained from any plant of the genus cannabis." The term "marijuana" is not used in the Act, nor, so far as I can discover, in any English legislation. I cannot, therefore, express any opinion at to whether that term is covered by the words "cannabis resin."

/s/ JOHN CYRIL SMITH
JOHN CYRIL SMITH

Sworn to before me this
10th day of January, 1975
/s/ PATRICK JAMES DANVERS MCCRAITH
Notary Public
Nottingham, England
[SEAL]

Certification

GREAT BRITAIN AND NORTHERN IRELAND,
LONDON, ENGLAND,
EMBASSY OF THE UNITED STATES OF AMERICA,

I, MICAELA A. CELLA, Vice Consul of the United States of America residing at London, England, duly commissioned and qualified, do hereby certify that PATRICK JAMES DANVERS MCCRAITH whose signature and official seal are respectively subscribed and affixed to the annexed certificate, was on the date of the signing thereof a Notary Public at Nottingham, England duly authorized to perform notarial acts, duly appointed and qualified, to whose official acts faith and credit are due; that I have compared the signature of said PATRICK JAMES DANVERS MCCRAITH on the annexed certificate with a specimen thereof filed in this Embassy; that I believe the signature to be genuine; that I have compared the impression of the seal affixed thereto with a specimen thereof filed in this Embassy, and that I believe the impression of the seal upon the said original annexed certificate to be genuine.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Consular Service of the United States of America at London, England, this thirteenth day of January in the year of Our Lord one thousand nine hundred and seventy-five.

[SEAL]

/S/ MICAELA A. CELLA
MICAELA A. CELLA
Vice Consul of the United States of America at London, England.
Service Receipt No.: C0922411
Tariff Item No.: 48
Fee: $2.50

Jan. 1975.

(See Opposite) ☞

D-8

Name	Address	File No.
[redacted]	[redacted] 24-14	[redacted]

Birthdate	Birthplace	Nationality
Jan. 20, 1889	Katomerion, Ley Kados, Greece	Greek

Date and Manner of Last Entry	Ever Lawfully Admitted For Permanent Residence
1912: New York City via SS Patris as an Immigrant	Yes - 1912

All Periods of Residence in U. S.

From	To
1912	Present

Location of Spouse, Sons, Daughters, Parents

Name	Age	Relationship	Location	Immigration Status
[redacted]	65	Wife(7/30/58)	LWS	USC

Two adopted daughters, both married & addresses unknown.

Criminal Record — Offense	Date and Place	Disposition - Include Periods of Imprisonment
Violation Federal Narcotic Laws	[redacted]	Sent. 2 yrs. [redacted]
Murder	[redacted]	Sent. to 33 yrs. [redacted] Served 17 years.

Present Immigration Status

Warrant Arrest served 11/15/55; W/D served 6/19/57
Case pending [redacted]
Action filed 7/2/58 (Petition/Review, Injunction-Dec. Judgement)

Grounds of Deportability

Sec. 241(a)(11) Convicted of dealing in Narcotics

Other Factors

Character investigation dated 6/24/59 favorable, Subject in advanced age(70) Poor health, under treatment for heart condition.

Self-employed as restaurant owner-operator. Receives social security benefits and income from room rents which make him self sufficient.

NONPRIORITY STATUS:

Recommended	Approved	Ordered
[signature] 7/29/59	[signature] 9-29-59	[signature] 9-29-59
(Signature and Date)	(Signature and Date)	(Signature and Date)

Form G-312 (Rev. 2-23-59) NONPRIORITY CASE SUMMARY

INSTRUCTIONS

Preparation: In triplicate.

Date and Manner of Last Entry: Include location if known, e.g., 1/31/58 El Paso as USC, or 2/15/58 without inspection near El Paso.

Ever Lawfully Admitted for Permanent Residence: Date, port, and class of admission.

Location of Spouse, etc.: Country only if not US. If US and living with subject, indicate LWS; not living with subject, give city and state. Indicate status of those in US as USC, PRA, NI, ILLEG. After spouse in ( ) the date of marriage.

Present Immigration Status: Include dates of OSC, W/A, or O/D.

Grounds of Deportability: All grounds whether or not lodged as charges, together with specifications.

e.g. Convicted of two crimes involving moral turpitude - Bigamy (1938). Perjury (1950).

e.g. Diagnosis - dementia praecox, paranoid type; committed 1953 - Aug. 1957.

Other Factors to Be Considered: Items which should be considered both for and against recommendation. Include type of employment, earnings, health of subject or dependents.

APPROVE	REJECT
ELM 4/19	
JRB 4/25	
RBR 4/27/71	

NAME	ADDRESS		FILE NO.
[redacted]	[redacted]	9-9	[redacted]

BIRTHDATE	BIRTHPLACE	NATIONALITY
September 20, 1948	Naco, Sonora, Mexico	MEXICO

DATE AND MANNER OF LAST ENTRY	EVER LAWFULLY ADMITTED FOR PERMANENT RESIDENCE
Except for short trips to Mexico, February 20, 1963 as Immigrant	Yes

PRESENT IMMIGRATION STATUS AND AVAILABILITY OF ANY ADMINISTRATIVE RELIEF.

Deportable Sec. 241(a)(11), No Relief

GROUNDS OF DEPORTABILITY

Convicted of possession of Narcotic Drug (marijuana) in [redacted] Oklahoma on April 28, 1971.

ALL PERIODS OF RESIDENCE IN U. S.

	FROM	TO
As illegal alien	about 9-20-50	2-20-63
As a Permanent Resident Alien	2-20-63	Present

PHYSICAL & MENTAL CONDITION REQUIRING TREATMENT OR CARE IN U.S.

The above-named is an admitted heroin addict. He is an applicant for treatment with the [redacted], however he is presently using approximately 18 grams heroin a day.

FAMILY SITUATION:

1. LOCATION OF SPOUSE, SONS, DAUGHTERS, PARENTS

NAME	AGE	RELATIONSHIP	LOCATION	IMMIGRATION STATUS
[redacted]	23	Spouse (8-19-70)	LMS	U.S.C.
[redacted]	6	Daughter	LMS	U.S.C.
[redacted]	44	Mother	[redacted] Tucson, Ariz.	Certified non-priority 12-30-71, PPA

2. EFFECT OF EXPULSION

Separation of family.

all attached exchange [illegible] 1/13/72 [redacted]
concurrence [illegible]
[illegible] 6-2-72

(Cont'd on reverse)

NONPRIORITY STATUS:

RECOMMENDED	APPROVED	ORDERED
[signature] 4-16-72	[signature] APR 26 1972	
District Director (Signature and Date)	Regional Commissioner (Signature and Date)	Chairman, CO Committee (Signature and Date)

Form G-312 (Rev. 2-7-63) **NONPRIORITY CASE SUMMARY**

CRIMINAL, IMMORAL OR SUBVERSIVE ACTIVITIES OR AFFILIATIONS IN U.S.
(Include Recent Conduct)

1. CRIMINAL RECORD	OFFENSE	DATE & PLACE	DISPOSITION (Include periods of imprisonment)
[redacted]	Possession of marijuana	[redacted] 6-24-67	Released to Military
[redacted]	Disorderly Conduct (Loud & Profane)	[redacted] 11-19-68	Fined $61 & $6
[redacted]	Possession of Narcotic Drug (marijuana)	[redacted] 4-28-71	Fined $750 plus court costs
#030914	Transportation of marijuana for sale & possession of marijuana	8-25-70	Dismissed

2. Subversive Activities or Affiliations
None known

OTHER FACTORS

Various agents charged with enforcement of State and Federal Narcotic Laws in the [redacted] vicinity have stated that the above-named and his brother [redacted] currently serving two concurrent five to six year sentences for violation of [redacted] Narcotic Laws, have described the two brothers as being the largest suppliers of marijuana and narcotics in the [redacted] area. He has admitted to a heroin habit costing $60 per day, but claims his total income for 1971 was $4,500.00.

He has not filed income tax return for years 1970 and 1971.

SW 242.22-C, March 1, 1972 and CO 242.2-C, March 8, 1972, relate.

INSTRUCTIONS

Preparation: In Triplicate

Date and Manner of last entry: Include place if known, e.g., 1-31-58 El Paso as USC or 2-15-58 without inspection near El Paso.

Ever lawfully admitted for permanent residence: date, port, and class of admission.

Present Immigration Status: Include dates of OSC, W/A, O/D, and give briefly relevant Immigration history.

Grounds of deportability: All grounds whether or not lodged as charges, together with specifications e.g. Convicted of two crimes involving moral turpitude - bigamy (1938). Perjury (1950)

Physical and Mental Condition: Set forth any pertinent information in full. If no treatment required, so state. If mental case show dates of hospitalization. Include information on both subject and dependents.

Family Situation:

1. Location of spouse, etc.: Country only if not U.S. If U.S. and living with subject, indicate LWS, not living with subject, give city and state. Indicate status of those in U.S. as USC, PRA, NI, ILLEG. After spouse in ( ) the date of marriage.
2. Effect of Expulsion: Explain fully economic and other pertinent effects on members of family.

Criminal, Immoral or subversive Activities:

1. Arrest record should be set out whether convicted or not.
2. Nature, extent and periods of subversive activities or affiliations should be fully covered.

Other factors to be considered: Items which should be considered both for and against recommendation. Include type of employment and earnings.

D-3

Name	Address	Dist.	File No.
[redacted]	[redacted], 12-3 [redacted]	SFR	[redacted]

Birthdate	Birthplace	Nationality
November 17, 1914	Lung Quong Village, Toyshan District Kwangtung, China	China

Date and Manner of Last Entry	Ever Lawfully Admitted For Permanent Residence
February 16, 1949, Calexico, California, as U.S. Citizen	No

All Periods of Residence in U.S.

From	To
5-19-21	6-14-35
12-18-36	Feb. 49
2-16-49	Present

Location of Spouse, Sons, Daughters, Parents, Siblings

Name	Age	Relationship	Location	Immigration Status
[redacted]	--	Wife (Div. 1940)	Unknown	USC
[redacted]	43	Wife (Div. 1945)	Unknown	USC
[redacted]	34	Wife (11-16-59)	LWS	USC
[redacted]	6	Son	LWS	USC
[redacted]	5 mos.	Daughter	LWS	USC
[redacted]	74	Father	Sacramento, Calif.	USC
[redacted]	67	Mother	Sacramento, Calif.	USC

Criminal Record

Offense	Date and Place	Disposition - Include Periods of Imprisonment
Auto theft	5-16-34, [redacted]	Released
Harrison Narcotics Act	2-4-35, [redacted]	Dismissed
Contr. to delinquency of minor	1-26-40, [redacted]	3 years probation
Vagrancy (pimp)	8-3-40, [redacted]	180 days suspended

(See reverse)

Present Immigration Status

Warrant of Arrest issued 4-29-49 (under 1917 Act); deportation recommended 10-12-49
New hearing 1-26-55 pursuant Sung decision; ordered deported by SIO 3-23-55
Application for Suspension of Deportation denied 3-23-55 as ineligible
Appeal dismissed 8-12-55
Warrant of Deportation issued 8-12-55

Grounds of Deportability

1. Excludable at entry - convicted of crime involving moral turpitude prior to entry, (Rape 1941)
2. Convicted for possession of narcotics (1953)
3. Entered without inspection by false claims to U.S. citizenship
4. Excludable at entry - no immigration visa or other entry document
5. Excludable at entry - no passport

Other Factors

Subject is a native and citizen of China, 46 years of age. It appears that he generally uses November 17, 1914 as his birthdate, although he has also claimed birth on other dates. He first entered the United States May 19, 1921 as the alien son of a domiciled Chinese merchant. He made a trip to China in 1935-36 and was absent in Mexico about one day in February 1949 when he fled to avoid prosecution on a charge of burglary lodged against him in Seattle, Washington. He was returned to the United States by Mexican authorities on February 16, 1949. He then gained entry by falsely claiming birth in the United States.

(See reverse)

NONPRIORITY STATUS: Recommended	Approved	Ordered
C. J. Beechie 7-6-61 (Signature and Date) Charles J. Beechie, District Director	L. W. Wilson (Signature and Date)	M. F. Feggioni 7/10/61 (Signature and Date)

Form G-312 (Rev. 4-25-60) NONPRIORITY CASE SUMMARY ks

INSTRUCTIONS

Preparation: In triplicate.

Date and Manner of Last Entry: Include location if known, e.g., 1-31-56 El Paso as USC, or 2-15-58 without inspection near El Paso.

Ever Lawfully Admitted for Permanent Residence: Date, port, and class of admission.

Location of Spouse, etc.: Country only if not U. S. If U. S. and living with subject, indicate LWS; not living with subject, give city and state. Indicate status of those in U. S. as USC, PRA, NI, ILLEG. After spouse in ( ) the date of marriage.

Present Immigration Status: Include dates of OSC, W/A, O/D, and give briefly relevant Immigration history.

Grounds of Deportability: All grounds whether or not lodged as charges, together with specifications. e.g. Convicted of two crimes involving moral turpitude - Bigamy (1938). Perjury (1950).

Other Factors to Be Considered: Items which should be considered both for and against recommendation. Include type of employment, earnings, health of subject or dependents. If mental case, show dates of hospitalization.

REMARKS: Criminal Record - continued

Rape	9-11-41, [redacted]	1 year imprisonment
Burglary, 2nd degree	5-23-47, [redacted]	Not shown
"Dis cond"	9-16-48, [redacted]	$50 bail forf; forf $250 on chg. of susp. stickup.
Not given	9-24-49, [redacted]	Discharged
Robbery (hold for Seattle)	2-17-49, [redacted]	Rel. to Kings Co. Sheriff
Susp. robbery	5-5-51, [redacted]	Not Shown
Narcotics & Gun Law	3-25-52, [redacted]	Disch & dismissed
Possession Narcotics	9-30-53, [redacted]	6 to 10 yrs; par. 10-15-59

Also, [redacted] 10-25-37, Drtg Act, 2 years 5-6-38, transferred to [redacted], Mo (Subject denies this last record.)

Other Factors - continued

Deportation proceedings were initiated by issuance of a Warrant of Arrest on March 25, 1946, charging deportability for conviction and sentence for rape. Before completion of these proceedings he departed to Mexico which invalidated the warrant. Proceedings were again instituted by issuance of a Warrant of Arrest on April 29, 1949 on the charge of having been convicted of the crime of rape prior to entry. During the subsequent hearing in 1949 he applied for Suspension of Deportation, which was denied, and he was ordered deported. A new hearing was held in 1955, resulting in the same decision. A Warrant of Deportation was issued August 12, 1955.

APPROVE	REJECT
[illegible]	
[illegible]	
[illegible]	

Other Factors - continued

He has a lengthy criminal record. In addition to the crime on which deportation is based, he is also deportable for conviction on September 30, 1953 for possession of narcotics. He was then sentenced to serve six to ten years in prison and was released on parole October 15, 1959. Upon completion of parole [redacted], Parole Agent, Sacramento, California, wrote a letter to the Service setting forth his views of subject. A summary of his letter is as follows:- This man has been extremely cooperative. He has followed his parole conditions to the letter as nearly as we can tell. He requested restoration of civil rights to marry his common-law wife, [redacted] and the purpose of this union was manifold: (1) The wife remained faithful during his period of incarceration and was still in love with him; (2) they had one child from this union, a boy, age 4; (3) both of the families concerned are local merchants in the upper income tax bracket in this community, and the child's inheritance would be protected by legalizing the union. The subject's employment revolved around one of the super markets owned by the wife's family, and he became a stock clerk. He worked diligently at this job and still holds this position at the [redacted] in Sacramento. His attitude and behavior towards his child were carefully scrutinized during this period of supervision, and it is apparent that he is a devoted father and a desirable parent. Further, a careful scrutiny was maintained of the possibility that he may return to his activities in narcotics traffic, but there is no reason to suspect that he had reverted to a previous behavior in this respect. Out of the great number of parolees this writer [redacted] has supervised, the subject of this correspondence has been one of the most co-operative and sincere in his attempts at rehabilitation, that I have had the opportunity to comment upon. This concludes comments from the letter.

Subject has been married three times, the first two marriages resulting in divorce. He had no children by the prior marriages. His present wife holds a 1/7 share in a family corporation of supermarkets. He is the manager of the liquor department in one market and his wife works in the office and another department of the same market. Their combined income during the past year was approximately $19,000. They have purchased a new home in a desirable section of Sacramento valued at approximately $25,000. They have assets consisting of $5,000 in furniture, an automobile valued at $4,000 and his wife's interest in the [redacted] is valued at approximately $50,000.

National Agency checks are negative, except for the arrests shown above. Subject is not eligible for adjustment of status nor for issuance of an immigrant visa on account of his criminal record.

Nonpriority is considered in order to avoid separation of the family. While it is not evident that subject's wife and children are dependent on him for support, it appears that in the event of his deportation a hardship would result to them, particularly the children, who are of tender years.

NAME	ADDRESS	DIST.	FILE NO.
[redacted]	[redacted] 340	[redacted]	[redacted]

BIRTHDATE	BIRTHPLACE	NATIONALITY
May 4, 1901	Hacienda de Jalpa, Gto., Mexico	Mexico

DATE AND MANNER OF LAST ENTRY	EVER LAWFULLY ADMITTED FOR PERMANENT RESIDENCE
October 16, 1917 at El Paso, Texas, without inspection	No

PRESENT IMMIGRATION STATUS AND AVAILABILITY OF ANY ADMINISTRATIVE RELIEF.
OSC issued 9/26/67 - convicted for sale Marihuana, deportation hearing held 12/5/67, ordered deportation suspended. 1st Session of 91st Congress closed without passage of concurrent resolution favoring suspension of deportation. Considered rejected by Congres 12/24/69. No administrative relief available.

GROUNDS OF DEPORTABILITY
Subject convicted in Superior Court, Maricopa County, Arizona 1/31/38 for sale of narcotic drugs (marihuana). 1/25/70 SIO ordered voluntary departure with alternate order of deportation.

ALL PERIODS OF RESIDENCE IN U.S.

	FROM	TO
California, Arizona and Wyoming	1917 through	1940 (exact dates not recalled)
Great Falls, Montana	1940	1944
Boise, Montana (addresses not recalled)	1944	1957
[redacted]	1957	1958
[redacted]	1963	1967
[redacted]	1967	Dec. 1968
[redacted]	Dec. 1968	1969

PHYSICAL & MENTAL CONDITION REQUIRING TREATMENT OR CARE IN U.S.
Good - subject had prostate gland operation in November, 1969, and is still recovering.

APPROVE	REJECT
AB 3/2-3	
[redacted]	
[redacted]	
[redacted]	

FAMILY SITUATION:

1. LOCATION OF SPOUSE, SONS, DAUGHTERS, PARENTS

NAME	AGE	RELATIONSHIP	LOCATION	IMMIGRATION STATUS
[redacted]	53	common-law wife	[redacted]	USC

2. EFFECT OF EXPULSION
Subject is 69 years old and would be hardship on subject due to age and not having lived in Mexico since 1917. No known living relatives in U.S. or Mexico. He receives railroad pension of $175 per month and owes doctor and hospital about $215 and owes $290 on his 1964 Chevelle.

(Cont'd on reverse)

NONPRIORITY STATUS: RECOMMENDED [redacted] 2/27/70
District Director (Signature and Date)

APPROVED [redacted] 3/5/70
Regional Commissioner (Signature and Date)

ORDERED
Chairman CO Committee (Signature and Date)

Form G-312 (Rev. 2-7-63)

NONPRIORITY CASE SUMMARY

CRIMINAL, IMMORAL OR SUBVERSIVE ACTIVITIES OR AFFILIATIONS IN U.S.
(Include Recent Conduct)

1. CRIMINAL RECORD — OFFENSE	DATE & PLACE	DISPOSITION *(Include periods of Imprisonment)*
Poss. Marijuana	[redacted]	none shown
Marc. (Marijuana)	[redacted]	6 months
Vag. Roamer	[redacted]	none shown
Drunk	[redacted]	$10 fine - paid
Drunk	[redacted]	$10 or 5 days

2. SUBVERSIVE ACTIVITIES OR AFFILIATIONS

None

OTHER FACTORS

Subject is presently living with his former common-law wife, [redacted] with whom he lived in common-law in Montana from 1940 to 1966; and have been living together again from August of 1969 to date at [redacted] out of Havre, Montana. He does not work. He receives a railroad pension of $175 a month and owes doctor and hospital about $215 and owes $290 on his 1964 Chevelle.

INSTRUCTIONS

Preparation: In Triplicate

Date and Manner of last entry: Include place if known, e.g., 1-31-58 El Paso as USC or 2-15-58 without inspection near El Paso.

Ever lawfully admitted for permanent residence: date, port, and class of admission.

Present Immigration Status: Include dates of OSC, W/A, O/D, and give briefly relevant Immigration history.

Grounds of deportability: All grounds whether or not lodged as charges, together with specifications e.g. Convicted of two crimes involving moral turpitude -- bigamy (1938). Perjury (1950)

Physical and Mental Condition: Set forth any pertinent information in full. If no treatment required, so state. If mental case show dates of hospitalization. Include information on both subject and dependents.

Family Situation:

1. Location of spouse, etc.: Country only if not U.S. If U.S. and living with subject, indicate LWS, not living with subject, give city and state. Indicate status of those in U.S. as USC, PRA, NI, ILLEG. After spouse in ( ) the date of marriage.
2. Effect of Expulsion: Explain fully economic and other pertinent effects on members of family.

Criminal, Immoral or subversive Activities:

1. Arrest record should be set out whether convicted or not.
2. Nature, extent and periods of subversive activities or affiliations should be fully covered.

Other factors to be considered: Items which should be considered both for and against recommendation. Include type of employment and earnings.

)) 14 D-6

Name	Address	Dist.	File No.
[redacted]	[redacted] 34-58	DAL ~~20~~	[redacted]

Birthdate	Birthplace	Nationality
June 27, 1921	Villa Garcia, N. L., Mexico	Mexico

Date and Manner of Last Entry	Ever Lawfully Admitted For Permanent Residence
About August, 1956, without inspection, near Del Rio, Texas	No

All Periods of Residence in U. S.

	From	To
Illegally	1944	1950
Illegally	1956	present

Location of Spouse, Sons, Daughters, Parents, Siblings

Name	Age	Relationship	Location	Immigration Status
[redacted]	unknown	wife	LWS	USC
[redacted]	3	son	LWS	USC

Criminal Record

Offense	Date and Place	Disposition - Include Periods of Imprisonment
Possession of Marihuana	[redacted]	Sentenced 2 years
Burglary	" " " "	Sentenced 2 - 5 years (Oct. 1946 to Apr. 1950)

Present Immigration Status

Investigation complete - OSC not issued.

Grounds of Deportability

241(a)(1) Excludable at entry - Previously convicted CIMT and possession marihuana.

Other Factors Subject has long immigration record dating from 1944, and was previously deported on 12-15-44, 4-3-45, 10-15-45, & 5-31-46. Under the name of [redacted] he was convicted Oct. 26, 1946 in the [redacted] of the State [redacted] sitting at [redacted] [redacted] for possession of Marihuana, for which he received a sentence of 2 years, and Burglary, for which he received a concurrent sentence of 2 to 5 years. He served the sentences in the State Penitentiary from Nov. 1946 to April 1950. He last reentered about August 1956, and began living with [redacted], a USC, in about December 1956. They have a child born in Sentinel, Oklahoma on January 5, 1958. The subject disclaims any prior marriages, and after his last apprehension he was married to [redacted], with whom he

(continued on reverse)

NONPRIORITY STATUS:	Recommended	Approved	Disapproved
	R. F. Carroll (Signature and Date) 8-4-61	L. W. Gilman (Signature and Date) 8-14-61	M. F. Fleming (Signature and Date) 8/14/61

INSTRUCTIONS

Preparation: In triplicate.

Date and Manner of Last Entry: Include location if known, e.g., 1-31-58 El Paso as USC, or 2-15-58 without inspection near El Paso.

Ever Lawfully Admitted for Permanent Residence: Date, port, and class of admission.

Location of Spouse, etc.: Country only if not U. S. If U. S. and living with subject, indicate LWS: not living with subject, give city and state. Indicate status of those in U. S. as USC, PRA, NI, ILLEG. After spouse in ( ) the date of marriage.

Present Immigration Status: Include dates of OSC, W/A, O/D, and give briefly relevant immigration history.

Grounds of Deportability: All grounds whether or not lodged as charges, together with specifications: e.g. Convicted of two crimes involving moral turpitude - Bigamy (1938). Perjury (1950).

Other Factors to Be Considered: Items which should be considered both for and against recommendation. Include type of employment, earnings, health of subject or dependents. If mental case, show dates of hospitalization.

REMARKS:

had been living, on July 3, 1961. At the time of his last apprehension, subject was confined to jail at [redacted] under investigation for suspected burglary. He was subsequently released with no charges filed. Since last entry subject used the name of [redacted], and when apprehended disclaimed any prior criminal record.

The subject has been regularly employed as a farm laborer on the farm of [redacted], since February, 1959 and earns $50.00 per week with a house and utilities furnished. He apparently is living in a valid family relationship, and his employer considers him to be a valued employee who performs his work well. There is nothing in the record to indicate that the subject or his family have ever been the recipients of public charity.

APPROVE	REJECT
[redacted]	
[redacted]	
[redacted]	

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Paul J. Curran

UNITED STATES ATTORNEY

2/28/75

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